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IN THE

Supreme Court of the United States

October Term, 1957

No. 786

JOHN A. KAYE,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ZELMA SHAPIRO,
Attorney for Petitioner,
1501 Broadway,
New York 36, N. Y.

Of Counsel:
SAMUEL J. SIEGEL,
1501 Broadway,
New York 36, N. Y.

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—v.—

UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Supreme Court of the United States:

JOHN A. KAYE, the Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on the 17th day of January, 1958.

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit is reported in 249 Fed. 2d —. A copy of this opinion is hereto annexed and marked Exhibit "A" hereto.

Jurisdiction

The judgment of affirmance of the United States Court of Appeals for the Second Circuit which is sought to be reviewed herein was made and entered on the 17th day of January, 1958.

No motion for an order requesting a rehearing was made to the United States Court of Appeals for the Second Circuit, nor was any application made for an order extending the time within which to petition for a writ of certiorari.

The jurisdiction of this Court is invoked under Rule 19 of the Supreme Court Rules and Title 28 U. S. C., Section 1254 (1), on the grounds that review by the Supreme Court by writ of certiorari is sought of a judgment of affirmance on appeal by the United States Court of Appeals for the Second Circuit. Certiorari is sought on the grounds that the United States Circuit Court of Appeals for the Second Circuit has rendered a decision on an important question of Federal law in a way in conflict with an applicable decision of this Court and that the United States Court of Appeals for the Second Circuit has sanctioned a departure by the District Court from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision.

Questions Presented for Review

The Petitioner John A. Kaye was convicted in the United States District Court for the Southern District of New York on counts 1 and 2 of the indictment herein. These counts charged the Petitioner with the crime of unlawfully, wilfully and knowingly and with intent to defraud, uttering and passing in negotiation, 2 counterfeit Kingdom of Belgium $1,000.00, 7% Gold bonds, due June 1, 1955, in violation of Section 479, Title 18 of the United States Code and the second count charged the defendant and others with conspiring to violate Section 479, Title 18 of the United States Code by negotiating 244 of the same bonds in violation of Section 371, Title 18 of the United States Code. The judgment of conviction of the United States District Court for the Southern District of New York was

based upon a verdict of "guilty" by a jury and was dated and entered the 31st day of January, 1957. Under said judgment of conviction, the Petitioner was sentenced to imprisonment for a period of 2 years on counts 1 and 2 and a committed fine of $2500 was imposed. The questions presented for review with regard to the trial of the aforementioned indictment are:

1. Was the denial of a mistrial to Kaye upon the admission of Evans' testimony, error in spite of the limitation at the time of admission and in the charge, Evans' testimony being a post-conspiracy statement made by a co-defendant before the Grand Jury some 2½ years after the termination of the conspiracy.

   (a) Was the denial of a mistrial on the ground of prejudice to Kaye, error when the Court admitted as evidence, testimony as to Berger's flight and denied a mistrial, but stated in its instructions that the evidence of flight was limited as to Berger alone.

2. Was the failure to provide a speedy trial, guaranteed by the 6th Amendment of the Constitution of the United States, more than 7 years having passed between arrest and trial, including some 4½ years between indictment and trial so great an error as to invalidate the conviction.

Statutory Provisions Involved

Title 18 United States Code.

"§ 371. *Conspiracy to commit offense or to defraud United States.*

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such

persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701."

"TITLE 18, UNITED STATES CODE, SECTION 479.

Uttering counterfeit foreign obligations or securities.

Whoever, within the United States, *knowingly* and with *intent to defraud,* utters, passes, or puts off, in payment or negotiation, any false, forged, or counterfeited bond, certificate, obligation, security, treasury note, bill, or promise to pay, mentioned in section 478 of this title, whether or not the same was made, altered, forged, or counterfeited within the United States, shall be fined not more than $3,000 or imprisoned not more than three years, or both."

Concise Statement of the Case

This petition seeks to review a judgment of the United States Court of Appeals for the Second Circuit, dated and entered the 17th day of January, 1958, which affirmed a judgment of conviction of the Petitioner rendered the 31st day of January, 1957, in the United States District Court for the Southern District of New York, which judgment of conviction was based upon a verdict of a jury finding the Petitioner guilty under Counts 1 and 2 of the indictment herein, a copy of said counts are hereto annexed and marked Exhibit "B" hereof. Count 1 of the indictment herein charged the Petitioner along with other co-defendants and co-conspirators with the crime of unlawfully, wilfully, and knowingly and with intent to defraud, uttering and passing in negotiation, 2 counterfeit Kingdom of Belgium $1,000.00, 7% Gold bonds, due June 1, 1955, in viola-

tion of Section 479, Title 18 of the United States Code and the second count charged the defendant and others with conspiring to violate Section 479, Title 18 of the United States Code by negotiating 244 of the same bonds in violation of Section 371, Title 18 of the United States Code. Under the aforementioned judgment of conviction, the Petitioner was sentenced to 2 years imprisonment and a $2500 committed fine was imposed.

An outline of the proof offered at the trial concerning the Petitioner is as follows:

Kaye was a licensed securities broker who was acquainted with Evangelista (Evans), an ex-prize fighter. In October of 1949, Evans delivered to Kaye's office two (2) counterfeit Kingdom of Belgium bonds. Kaye's cashier obtained a quotation on these bonds from a broker. Kaye subsequently spoke to one Wheeler, employed at a bank, about the valuation on these bonds. Kaye had been negotiating with one Arthur Baum about loans on various corporate accounts and attempted to obtain a loan using foreign bonds as collateral. Kaye proposed to use the type of counterfeit bonds which Evans had left with him as security for a $150,000.00 loan. Baum asked if Kaye's people would sell the bonds instead and Kaye said "yes". They agreed upon a sale of 250 bonds at $600.00 a bond, plus $50.00 commission for Kaye per bond. Kaye attributed his taking so low a price on the bonds to the urgency of the sellers in getting their money, and the fear that selling 250 bonds would depress the market. Kaye gave Baum one of the bonds and later in the day a second one for which he was paid $600.00 per bond. On the following Saturday, Baum came to Kaye's house to close the deal. Kaye received $1,200.00 cash for two (2) more bonds and $7,000.00 as down payment for the rest of the bonds which were to be delivered. Later, Evans arrived and Kaye gave Baum a bundle containing 242 more bonds. Baum agreed to pay $50,000.00 in cash by the following Monday

and the balance in a week. That night, Kaye went to Baum's house and tried to get the bonds back saying that his principal did not want the bonds out over the week-end. Baum falsely represented that he had delivered them to an out-of-town customer. Baum agreed to pay the balance of the purchase price in the form of two checks. Kaye took the checks to two men outside who refused to accept them. Later on, the 240 bonds were returned to Kaye. On Monday, Baum checked the bonds with J. P. Morgan & Co. by their numbers and learned that many had been redeemed and destroyed or cancelled. When he told Kaye this, Kaye said the deal was off and told Lennie to get Baum's money back. Lennie (the co-defendant Berger) left and never returned. Testimony of the defendant co-conspirator Evans, before the Grand Jury, was admitted in evidence as against Evans alone. The court instructed the Jury to disregard it as against Kaye. Similarly, testimony of an Atlantic City police officer as to the apprehension of the co-conspirator Berger while hiding in a clothes closet of an Atlantic City apartment, was received in evidence as against Berger alone. Instructions were given limiting the use of this testimony in the case as against Berger only.

The Petitioner testified on the trial herein.

Basis for Federal Jurisdiction in the Court of First Instance

The basis of Federal Jurisdiction in the Court of first instance was that the crime charged the defendant and others with conspiring to violate Section 479, Title 18 of the United States Code by negotiating counterfeit Belgium Bonds in violation of Section 371, Title 18 of the United States Code and with uttering 2 counterfeit Belgium Bonds, Section 479, Title 18 United States Code.

Reasons Relied on for the Allowance of the Writ of Certiorari

The basis of this application is that the United States Court of Appeals for the Second Circuit by its judgment of affirmance dated the 17th day of January, 1958 which affirmed the judgment of conviction of the Petitioner rendered by the United States District Court for the Southern District of New York on the 31st day of January, 1957, decided an important question of Federal Law in a way in conflict with an applicable decision of this Court and has sanctioned a departure by a lower court from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision.

The particular decision of this Court that it is claimed the opinion and decision of the United States Court of Appeals for the Second Circuit are in conflict with is *Delli Paoli* v. *U. S.*, 352 U. S. 232. In the *Delli Paoli* case, the admission of the co-defendant was made several days after the arrest. In the instant case, the statement of Evans before the Grand Jury was made almost 3 years after the arrest of Evans and the petitioner. Also, in the instant case, when Evans was being examined by the Assistant U. S. Attorney before the Grand Jury, attempts were being made to have him involve Kaye in the crime. This is different from the situation in *Delli Paoli*.

As to the admission of testimony as to Berger's flight, it was admitted and instructions given according to the Court's interpretation of the *Delli Paoli* case.

The *Delli Paoli* case did not contemplate the admission of acts as contrasted with statements when the decision was rendered by the Supreme Court. See:

Krulewitch v. *United States*, 336 U. S. 440;
Fiswick v. *United States*, 329 U. S. 211, 217.

On the issue of a speedy trial, the Appellate Court is disregarding Rule 48(b) of Federal Rules of Criminal Procedure which provides that

> "If there is an unnecessary delay in bringing a defendant to trial, the Court may dismiss the indictment, information or complaint."

There is no necessity under this Rule for the defendant to speed the trial by efforts of his own or to make a motion for dismissal because of delay at the beginning of the trial. The protection of the Rule and the 6th Amendment of the Constitution of the United States are basic rights which adhere to a defendant and for which he need make no affirmative move in order to invoke their protection.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

ZELMA SHAPIRO,
Attorney for Petitioner,
1501 Broadway,
New York 36, N. Y.

Of Counsel:
SAMUEL J. SIEGEL,
1501 Broadway,
New York 36, N. Y.

EXHIBIT A

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 86—October Term, 1957.

(Argued December 2, 3, 1957 Decided January 17, 1958.)

Docket No. 24612

———o———

UNITED STATES OF AMERICA,
Plaintiff-Appellee.

—v.—

JOHN A. KAYE,
Defendant-Appellant.

———o———

Before:

CLARK, *Chief Judge,*
MOORE, *Circuit Judge, and* SMITH, *District Judge.*

Appeal from the United States District Court for the Southern District of New York, Edmund L. Palmieri, *Judge.*

Defendant, John A. Kaye, appeals from his conviction under 18 U. S. C. 479 for uttering and passing counterfeit Kingdom of Belgium bonds with intent to defraud, and under 18 U. S. C. 371 for conspiring to violate Section 479 by negotiating similar bonds. Affirmed.

PAUL W. WILLIAMS, United States Attorney for the Southern District of New York (John H. Carroll, Special Asst. U. S. Atty., Robert Kirtland, Asst. U. S. Atty., of counsel), *for plaintiff-appellee.*

SAMUEL J. SIEGEL, New York City, *for defendant-appellant.*

SMITH, *District Judge*:

This is an appeal by John A. Kaye from a judgment of conviction entered in the United States District Court for the Southern District of New York on trial before Judge Palmieri and a jury, on a verdict of guilty on two counts, the first of violation of 18 U. S. 479 by wilfully uttering with intent to defraud two counterfeit Kingdom of Belgium bonds, the second of conspiracy to violate 18 U. S. C. 479 by negotiating 244 of the same counterfeit bonds. Kaye was sentenced to imprisonment for two years on each count, to run concurrently, and fined $2500 on the first count.

There was evidence that Kaye was a licensed securities broker who was acquainted with Evangelista (Evans), an ex-prize fighter. Evans in October of 1949 brought in to Kaye two counterfeit Kingdom of Belgium $1000 7% gold bonds of 1955. At Kaye's request his cashier obtained a quotation from Kaye's broker. The quotation was about 116½ ($1165 for a $1000 bond). Wheeler, employed at a bank, told by Kaye he had an opportunity to buy Belgium bonds below the market, warned Kaye to be careful about the sellers. Kaye told Wheeler they were European refugees. Earlier in the year Kaye had informed one Arthur Baum, president of First Guardian Securities Company, that he would like to arrange a loan for Better Products Company, using foreign bonds as collateral. The day after receiving the two bonds from Evans, Kaye, with Henry Winston, president of Super Electric Company, a company which First Guardian had been financing, had lunch with

Baum and Baum's brother. Kaye proposed to Baum that First Guardian loan $150,000 to Better Products, Belgium 7's of 1955 to be used as collateral. It was proposed that part of the collateral loan be used to reduce Super Electric's indebtedness to First Guardian. Baum asked if Kaye's people would sell the bonds instead and Kaye said "yes." They agreed on a sale of 250 bonds of $1000 each, at a price of 60, or $600 a bond, plus $50 commission for Kaye per bond. Kaye attributed the low price to disagreement between the refugees, who had their money in Better Products and wanted to get out and Young, who he falsely said was an officer of Better Products. Kaye gave Baum one of the bonds, and later that day a second one, for which two bonds Baum paid Kaye $1200. Baum later that day sold the two bonds through a broker for $1120 each. On the following Saturday Baum came to Kaye's house to close the deal. He paid $1200 cash for two more bonds and paid $7000 cash as down payment for the rest of the bonds to be delivered. After Evans, described by Kaye as Young's messenger, came to the house Kaye gave Baum a bundle containing 242 more bonds. Baum rejected two, one because it was coffee stained. Kaye explained that the refugees had smuggled the bonds out of Europe in coffee pots. Baum agreed to pay $50,000 in cash the following Monday, the balance in one week. That evening Kaye went to Baum's house in Riverdale and told Baum Young didn't want the bonds out over the week-end. Baum falsely represented he had delivered them to a customer in New Rochelle. Baum was willing to pay the balance of the purchase price. Checks were made out several different ways, finally as two checks to Kaye's order for $46,400 and $99,600. The checks were taken by Kaye out to two men in a car, who rejected them and came into the house. The two untidy and unkempt men were introduced by Kaye to Baum as Young's messengers, Lennie and Joe. After further negotiations at home and at a restaurant the 240

bonds were returned to Kaye, the deal to be completed the next day directly with Young. At that point Baum had given $7000 cash on the purchase of the 240 bonds to Kaye, of which $4000 had been turned over to Evans. Kaye gave Baum his own check for $4000 to insure Baum against loss of the $4000, and agreed to retain the other $3000 pending closing of the deal. Later he gave the $3000 to Evans. Sunday, the Baums were introduced to Young and arrangements made to complete the deal Monday. Monday before the time set for closing Baum checked a list of the bond numbers, which he had compiled without Kaye's knowledge, with J. P. Morgan & Company and learned that many of the bonds of those numbers had been redeemed and destroyed or cancelled. When he told Kaye this in Lennie's presence Kaye said the deal was off and told Lennie to go to Young and get Baum's money back. Lennie (co-defendant Berger) left and never returned. Kaye took Baum to Young's office and was told by Young that Young actually had nothing to do with the bond deal. The investigation, indictment of Kaye, Evans, Berger and John Doe, the "Joe" of the negotiations, and conviction of Kaye, Evans and Berger followed. "Joe" had died in the meantime.

The principal ground of Kaye's attack on the judgment against him is a claimed insufficiency of evidence of Kaye's knowledge that the bonds were counterfeit. The evidence on this point, from which the jury could draw an inference of such knowledge, although circumstantial, was considerable. It included (1) the price at which Kaye was to, and did offer the bonds, $650 each when the market price was over $1100 each, (2) the source of the bonds, Evangelista (Evans) an ex-prize fighter who did not claim ownership, (3) Wheeler's warning to Kaye that they might be stolen, (4) Kaye's original efforts to place them as security for a loan where detection of their spurious nature might have been longer delayed, and later belief by Kaye that Baum was placing the bonds with a private buyer, the butcher Buxbaum, where again the probability of prompt and care-

ful checking of their genuineness would be slight, (5) the disreputable appearance of the messengers of the purported owner, (6) the misrepresentation by Kaye of Young's business and connection with the bonds, (7) the many contradictions in Kaye's pre-trial and trial statements, and (8) Kaye's unsatisfactory explanations of his actions. Kaye contends that this evidence failed to show knowledge the bonds were counterfeited rather than stolen. There was sufficient evidence to make this a question for the jury, for as the government points out, knowledge of counterfeiting is the more logical since Kaye would have expected so large a theft to have been widely known among dealers in securities, and Kaye had testified before the grand jury that he gave no thought to that possibility (theft), and that he knew they were not blocked assets. The issue of knowledge of counterfeiting was plainly before the jury on the charge, and the jury's awareness and consideration of the issue are placed beyond doubt by the jury's request for additional instructions.

Testimony of an Atlantic City police officer of the apprehension of the defendant co-conspirator Berger hiding in a clothes closet of an Atlantic City apartment was received in evidence as against Berger alone. Testimony of the defendant co-conspirator Evans before the grand jury was admitted in evidence as against Evans alone. Defendant Kaye attacks as prejudicial to him the admission of evidence of Berger's flight and Evans' post-conspiracy statements. Proper instructions were given limiting the use of this testimony in the case against Berger only and Evans only respectively. In view of the limitation at the time of the admission of the evidence and in the charge, the denial of a mistrial on the ground of prejudice to Kaye was not error. *Delli Paoli* v. *U. S.*, 352 U. S. 232. Indeed, in the case of evidence of Berger's flight the restriction of use of the testimony may not have been necessary. *Lutwak* v. *U. S.*, 344 U. S. 604.

The defendant Kaye attempted to show that according to Moody's Manual of Investments the bonds had a high price of 120 and a low price of about 35 during the ten year period 1939 to 1949. The court sustained an objection to such evidence and denied a request that judicial notice be taken of the prices for the same period. These rulings, attacked on appeal, were clearly correct. The period covered by the proffered evidence, including the period of the German occupation of Belgium, covered times and circumstances too remote from the period of the alleged conspiracy, July-October, 1949, to have any probative value on the issues in the case. The only prices material were the prices reasonably contemporaneous with Kaye's negotiations with the Baums.

Kaye contends that proof of the counterfeit nature of 240 of the bonds through circumstantial evidence was error. The counterfeit nature of the four bonds placed in evidence was directly proved. The jury was entitled to infer from the circumstances proved that the remaining 240 bonds were also counterfeit, 159 of them bearing numbers of bonds of that issue which had prior to that time been cancelled by perforation, as shown by business records kept in the normal course of business by the Belgium government's fiscal agent.

Kaye in his Request No. 19 asked the trial court to charge the jury that: "You must be satisfied beyond a reasonable doubt that the defendant Kaye had knowledge that the two bonds referred to in Count 1 were counterfeit at the time he gave them to Arthur Baum in order to find Kaye guilty under either count. You cannot apply any knowledge that Kaye may have received after Monday, October 24, 1949, retroactively to October 19 or 20." The charge of the court is attacked for failure to charge in the language of Request 19 and for failure to rule specifically on other requests, prior to the charge. It is not shown however to be defective in substance, Request 19 having been substantially covered, R. pp. 1128, 1129, 1147, 1158-60,

1168, 1169, 1177, 1180, and no prejudice is shown from failure to comply literally with Rule 30, Federal Rules of Criminal Procedure. The court made it plain that knowledge of the counterfeit nature of the bonds at the time of the uttering was required for conviction, although it properly allowed later actions and statements of a defendant to be considered for what light they might throw on his state of mind at the critical time. The main and supplemental charges are full, complete and fair.

Finally Kaye contends that failure to provide a speedy trial, guaranteed by the Sixth Amendment to the Constitution of the United States, invalidates the conviction. More than seven years passed between arrest and trial, including some four and one-half years between indictment and trial. The indictment was however found within the period of limitations, no effort is shown to have been made by defendant to speed the trial, no prejudice is shown to have resulted to defendant, and no motion was made by defendant at the beginning of trial for dismissal because of delay. He may not now successfully attack the judgment on that ground. *Worthington* v. *U. S.*, 7 Cir. 1 F. 2d 154, cert. den. 266 U. S. 626; *Collins* v. *U. S.*, 9 Cir. 157 F. 2d 409; *Pietch* v. *U. S.*, 10 Cir. 110 F. 2d 817, 129 A. L. R. 563, cert. den. 310 U. S. 648; *U. S.* v. *Stein*, D. C. S. D. N. Y. 18 F. R. D. 17; *U. S.* v. *Provoo*, D. C. Md. 17 F. R. D. 183, 198.

The judgment is affirmed.

EXHIBIT B

Indictment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

No. C 138-292

UNITED STATES OF AMERICA,

—v.—

JOHN EVANGELISTA, LEONARD BERGER, JOHN A. KAYE, and JOHN DOE, also known as "Joe",

Defendants.

The Grand Jury charges:

1. On or about the 19th day of October, 1949, at the Southern District of New York, JOHN EVANGELISTA, LEONARD BERGER, JOHN A. KAYE, and JOHN DOE, also known as "Joe", the defendants, unlawfully, wilfully, knowingly and with intent to defraud, did utter and pass in negotiation, false, forged and counterfeited bonds and securities of a foreign government, purporting to be and in imitation of securities issued under the authority of such foreign government, to wit, two counterfeited Kingdom of Belgium, $1,000 7% Gold Bonde due June 1, 1955. (Title 18, Sections 479 and 2, United States Code.)

SECOND COUNT

The Grand Jury further charges:

1. On or about the 1st day of July, 1949, and thereafter up to and including the date of the filing of this

indictment, at the Southern District of New York, JOHN EVANGELISTA, LEONARD BERGER, JOHN A. KAYE, and JOHN DOE, also known as "Joe", the defendants, conspired, confederated and agreed with each other and with divers other persons whose names are to the Grand Jurors unknown, to violate Section 479, Title 18, United States Code.

2. It was a part of said conspiracy that the said defendants would unlawfully, wilfully, knowingly and with intent to defraud, utter and pass in negotiation, false, forged and counterfeited bonds and securities of a foreign government, purporting to be and in imitation of securities issued under the authority of such foreign government, to wit, approximately 244 counterfeited Kingdom of Belgium $1,000 7% Gold Bonds due June 1, 1955.

OVERT ACTS

1. In pursuance of said conspiracy and to effect the objects thereof, on or about the 15th day of September, 1949, at the Southern District of New York, the defendant JOHN EVANGELISTA made a telephone call to the defendant JOHN A. KAYE, who was then at 72 Wall Street, New York, N. Y.

2. Further in pursuance of said conspiracy and to effect the objects thereof, on or about the 10th day of October, 1949, at the Southern District of New York, the defendant JOHN EVANGELISTA met the defendant JOHN A. KAYE at 72 Wall Street, New York, N. Y.

3. Further in pursuance of said conspiracy and to effect the objects thereof, on or about the 19th day of October, 1949, at the Southern District of New York, the defendant JOHN A. KAYE met Arthur Baum and Leonard Baum, at 20 Pine Street, New York, N. Y.

4. Further in pursuance of said conspiracy and to effect the objects thereof, on or about the 21st day of October, 1949, at the Southern District of New York, the defendant JOHN A. KAYE had a conversation over the telephone with LEONARD BAUM, who was then at 20 Pine Street, New York, N. Y.

5. Further in pursuance of said conspiracy and to effect the objects thereof, on or about the 22nd day of October, 1949, at the Southern District of New York, the defendants JOHN EVANGELISTA, JOHN A. KAYE, LEONARD BERGER and JOHN DOE, also known as "Joe", conferred with Arthur Baum in the vicinity of 242nd Street and Broadway, New York, N. Y.

6. Further in pursuance of said conspiracy and to effect the objects thereof, on or about the 24th day of October, 1949, at the Southern District of New York, the defendants JOHN EVANGELISTA, JOHN A. KAYE and LEONARD BERGER had a conversation with Arthur Baum at 72 Wall Street, New York, N. Y.

7. Further in pursuance of said conspiracy and to effect the objects thereof, on or about the 24th day of October, 1949, at the Southern District of New York, the defendant JOHN A. KAYE had a conversation over the telephone with Arthur Baum, who was then at 4625 Fieldston Road, New York, N. Y.

8. Further in pursuance of said conspiracy and to effect the objects thereof, on or about the 25th day of October, 1949, at the Southern District of New York, the defendant JOHN EVANGELISTA had a conversation over the telephone with Arthur Baum, who was then at 20 Pine Street, New York, N. Y. (Title 18, Section 371, United States Code).

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MYLES J. LANE,
United States Attorney

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Foreman

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 786

JOHN A. KAYE, PETITIONER,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. A) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals (Pet. App. A) was entered on January 17, 1958. The petition for a writ of certiorari was filed on February 15, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether it was error for the trial court in a joint trial involving petitioner and two co-conspirators to admit statements made by one defendant and evidence of flight by another defendant after the conspiracy ceased even though the court instructed the jury to con-

sider such statements or acts only against the particular defendant involved.

2. Whether the case should have been dismissed for lack of a speedy trial where there was no motion by defendant, either for a prompt trial or for dismissal of the indictment.

STATEMENT

In the United States District Court for the Southern District of New York petitioner was found guilty (R. 3) on two counts for wilfully uttering with intent to defraud two counterfeit $1000 Kingdom of Belgium bonds (count 1) in violation of 18 U.S.C. 479 and of conspiring (count 2) to violate 18 U.S.C. 479 by negotiating 244 of the same counterfeit bonds (R. 8-9). Petitioner was sentenced to concurrent terms of two years on each count and fined $2500.00 on count one (R. 4). His conviction was affirmed on appeal.

The evidence showed that petitioner, a licensed securities broker, was a friend of Evangelista (Evans), an ex-prize fighter (R. 82a).[1] In October, 1949, Evans was asked by Mr. Berger if he wanted to buy some bonds. Evans told Berger that he knew a stock broker who might be interested. Evans then approached petitioner who indicated, presumably without asking who the owner was, that he was interested and asked about the kind and price of the bonds. Evans was told by Berger that the bonds were Belgium bonds and the price was 60 per cent of their face value *i.e.*, $600 for a $1000 bond. In October, 1949, Evans took two of the bonds to petitioner (R. 82a) telling him that there

[1] The numerals followed by "a" refer to the Government's appendix which was filed in the Court of Appeals and is part of the record in this Court. The other references are to petitioner's appendix in the Court of Appeals.

was a quarter of a million dollars in these bonds and that they were the possessions of some wealthy refugees who wanted to get back to Europe (R. 1a). From his cashier petitioner obtained a quotation of 116½ ($1165 for a $1000 bond). When petitioner told Wheeler, a friend of his employed at a bank, about the possibility of buying the bonds below the market, Wheeler warned petitioner to be careful about the sellers (see R. 45, 46).[2]

Earlier in the year petitioner had informed Arthur Baum, president of the First Guardian Securities Company, that he would like to arrange a loan for Better Products Company using foreign bonds as collateral (R. 29a). It was later agreed, however, that petitioner, instead of pledging foreign bonds as collateral to Baum, would sell 250 Belgain bonds of $1000 each at a price of $600 a bond plus $50 commission per bond for petitioner (R. 31a-32a). The low price, petitioner said, was due to a disagreement among the refugees who had some money in the Better Products Company and wanted to get out of the company and go home (R. 34a).

Petitioner delivered one bond to Baum and a few days later Baum came to petitioner's house and paid cash for two more bonds ($1200) and $7000 (by check to petitioner) as down payment on the remainder of the bonds (R. 32a, 35a, 42a, 44a). Evans delivered the remaining 240 bonds to petitioner who turned them over to Baum (R. 36a). Baum agreed to pay $50,000 in cash by the following Monday to complete the deal.

Later that evening, petitioner went to Baum's house and told him that Mr. Young, his principal and an

[2] Some of the evidence in the preceding paragraph is contained in the Government's appendix, which was filed in the Court of Appeals (R. 53a, 55a, 57a, 58a) and is set forth as background

officer of the Better Products Company (R. 32a), did not want the bonds out over the week-end (R. 38a). Baum falsely told petitioner that he had already sold the bonds to a customer. He gave petitioner two checks made to petitioner's order for $46,400 and $99,600 (R. 20a, 38a-39a). Petitioner took these checks outside to a car but about an hour or so later he and two other men, described by petitioner as Young's messengers, returned and insisted that Baum turn the bonds over to them (R. 40a-44a). Baum subsequently gave to these men 230 of the bonds (R. 42a).

Before completing the deal Baum checked the bond numbers and learned that many of the Belgian bonds had been redeemed and destroyed or cancelled (see R. 36). When Baum told petitioner this, the petitioner said the deal was off. He said that he had given part of Baum's $7000 deposit to Mr. Young and he instructed Berger to get the money. Berger left but never returned. Petitioner gave various statements as to the transaction to federal Secret Service agents in November, 1949; to the Attorney General of New York in January, 1950; to the National Association of Securities Dealers in March, 1950; and to the grand jury in June, 1952. There were a number of inconsistencies in these statements (R. 1a-22a).

ARGUMENT

1. Near the end of the government's case, the testimony of Evans before the grand jury in June, 1952, was offered in evidence against Evans alone. The statement was exculpatory in nature, but did mention dealings with petitioner and Berger (R. 53a-80a). In his charge, the judge said (R. 42):

> And again I repeat,[3] be careful now that when you consider what Kaye said after this was all over and before he took the stand, and when you consider what Evans said after it was all over and before the trial, that whatever they said counts against the one who said it, and not against anybody else.

There was also testimony by a police officer of the apprehension of Berger in a clothes closet in an Atlantic City, New Jersey, apartment (see R. 40) in November, 1951. As to this, the court charged (R. 63):

> I alluded to the evidence of flight by Berger and I want to be sure that, assuming you believe that evidence of flight * * * I want to be sure that you disregard this evidence of flight received against the defendant Berger, in considering the cases of the other defendants.
>
> In other words, if it is received and considered by you, it should be received and considered as against Berger, not as against anybody else.

In the face of these careful instructions, the argument that the admission of the testimony referred to constituted prejudicial error is clearly without merit. *Delli Paoli* v. *United States*, 352 U.S. 232. Whatever distinctions may be drawn between the statement in the *Delli Paoli* case (made immediately after the event which strongly implicated the defendant there), and the statement of Evans here (which was exculpatory in

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[3] The judge had previously given a similar charge with respect to Kaye's grand jury testimony and mentioned the general rule as to post-conspiracy statements (R. 31).

nature and did not directly implicate petitioner at all), make this an even stronger case than *Delli Paoli*. As the Court of Appeals pointed out, the admissible evidence against petitioner was sufficient to support the verdict.

2. Petitioner contends that, in violation of the Sixth Amendment, he was denied a speedy trial (Pet. 8) in that he was not brought to trial until 4½ years after he was indicted.[4] Petitioner never requested an earlier trial and he made no motion to dismiss on such ground at the trial. Under these circumstances, he cannot after trial attempt to have his conviction set aside on such ground, particularly since no showing is made that petitioner was prejudiced by the delay and since he apparently deemed it the better strategy on his part not to press for trial. The constitutional right to a speedy trial is a personal right which may be waived by failure to assert it. *Campodonico* v. *United States*, 222 F. 2d 310 (C.A. 9), certiorari denied, 350 U.S. 831; *Fowler* v. *Hunter*, 164 F. 2d 668 (C.A. 10), certiorari denied, 333 U.S. 868; *Shepherd* v. *United States*, 163 F. 2d 974 (C.A. 8).

[4] The delay in indictment after the offense was obviously due to the fact that Berger was not found until November, 1951.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

WILLIAM E. FOLEY,
Acting Assistant Attorney General.

BEATRICE ROSENBERG,
WILLIAM J. SCHAFER III,
Attorneys.

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